POON GUAN SDN. BHD.

v.

SEM SIONG INDUSTRIES SDN. BHD.

FEDERAL COURT, KUALA LUMPUR
WAN SULEIMAN FJ
ABDUL HAMID OMAR FJ
HASHIM YEOP SANI FJ
[CIVIL APPEAL NO. 31 OF 1983]
28 JULY 1983

LANDLORD AND TENANT: *Termination of tenancy - Whether in accordance with agreement - Avoiding provision - Construction - Closure of business - Whether "beyond control".*

The appeal was against the order of the High Court dismissing the appellant's claim for a declaration that the tenancy agreement with the respondent had not been properly terminated and allowing instead the counter-claim of the respondent for vacant possession and mesne profits.

Held:

The tenancy agreement had not been properly terminated. There had been an improper exercise on the part of the respondent of the power provided in the tenancy agreement to terminate the tenancy in the event of its bowling alley being closed for reasons beyond its control. A rise in price will not in itself be sufficient to constitute a reason "beyond the control" of the parties. Further, unless a contract clearly and specifically so provides, the Court will not construe an avoiding provision contained in it in such a manner so as to permit a party to take advantage of a situation brought about by his own act or omission.

[Appeal allowed. Counter-claim dismissed.]

Cases referred to:

Peter Dixon & Sons, Ld. v. Henderson, Craig & Co. [1919] 2 KB
Tennants Ld. v. Wilson & Co. [1917] AC 495
Cheall v. APEX [1982] 3 All ER 855
New Zealand Shipping Company Ltd. v. Societe Des Ateliers Et Chantiers De France [1919] AC 1

For the appellant - T. Thomas; M/s. Skrine & Co.
For the respondent - P.P. Royan (A.S. Sidhu with him); M/s. Shook Lin & Bok

JUDGMENT

Hashim Yeop Sani FJ:

The appellant as plaintiff in the High Court sought for a declaration that the tenancy agreement (the terms of which are expressed in a letter dated 9 November 1978 - p. 81-82 of the Appeal Record) had not been validly terminated. The appellant also sought for an injunction to compel the respondent to restore the air-conditioning supply, damages for breach of contract and costs. At the conclusion of the trial the High Court dismissed the claim and allowed instead the counter-claim of the landlord (respondent now) for vacant possession and mesne profits. The appeal before us is against that order.

It is not disputed that the terms of the tenancy agreement are as expressed in the said letter dated 9 November 1978 from the respondent company which confirmed a verbal agreement reached earlier between the Managing Director of the appellant company (PW1) and the Chief

Executive of the Low Yat Group of companies, one Dato Low Yow Chuan (not a witness). The terms of the lease are quite straight forward with rentals for the first three years agreed to at RM1,300 per mensem, the second three years at RM1,500 per mensem and the third three years at RM1,700 per mensem. the rental was inclusive of air conditioning supply for "the period of operation of the bowling alley" of the respondent company.

Quite early in the proceeding it must have been realised by both Counsel and the trial Judge that the real issue before the Court was the interpretation of para. 6 of the said letter dated 9 November 1978 and its application to the facts of the case. Paragraph 6 of the letter reads as follows:

> **Others**
>
> In the event of redevelopment of our property whereby the premises is required to be demolished, or our Bowling Alley is closed for reasons beyond our control, we reserve the right to terminate the tenancy agreement by giving 3 (three) months' notice in advance, with no claim for compensation by you except for the period of the first 3 (three) years.

In the middle of the proceeding the learned Judge noted and the parties conceded that the first limb of para. 6 could not apply. The real issue was thus further reduced to whether on a proper interpretation of the second limb of para. 6 of the tenancy agreement the respondent company had the right to terminate the tenancy agreement in the way it did. The second limb reads "or our Bowling Alley is closed for reasons beyond our control".

Purporting to act under the said para. 6 the respondent company wrote to the appellant a letter on 2 July 1982 the gist of which reads as follows:

> We refer to the above matter and wish to inform you that our Sem Siong Bowl Centre will be closed down very shortly. Accordingly, as in accordance with our Agreement we hereby give you 3 months' notice of our intention to terminate your Tenancy Agreement in respect of the above premise.
>
> We will be grateful if you would vacate the premise and hand over the same to us on the 1 October 1982.

The appellant promptly replied on 9 July 1982 (p. 119) to the effect that since a great deal of money had been expended on the Kentucky Fried Chicken Restaurant in the premises, the appellant wanted further information on the reason the respondent proposed to close down the bowling alley. The rest of the letter dealt with the alleged "systematic attempt" by the respondent to terminate the tenancy for the previous one year for failure to increase the rental, which is not relevant for our present purpose. The respondent replied to this letter on 17 July 1982 (p. 121) the gist of which reads as follows:

> We, on our part, can do nothing more but to assure you that **our action is merely a result of our need to achieve a reasonable business income from the premises concerned instead of incurring a substantial loss** at the present moment.
>
> As stated in our letter dated 2 July 1982 it is our intention to close down our Sem Siong Bowl in view of the heavy loss we are incurring every month. We feel it to be premature at the moment to inform you exactly what our plans are with regard to the premises, but suffice to say our plans will involve the demolition of the entire internal area of the premises concerned and the removal of all the bowling equipments. In addition, the major part of the outside building will also undergo extensive renovation work.
>
> Therefore, while we still reserve the right to differ from your "opinion that a mere change of business will not entitle (us) to terminate your client's tenancy", we would assert that from the above **facts our action is not only a mere change of business but also involve major renovation and redevelopment of the premises concerned.** (Emphasis is mine)

It would seem to us that the above letter carries more than one reason and it is also quite obvious that the respondent purported then to exercise the powers under both limbs of para. 6 of the tenancy agreement. We also note that the above letter was written on 17 July 1982 but on 20 July 1982 there appeared an advertisement in the Malay Mail of that date to let out the premises concerned (p. 123). It is also not disputed that the premises was eventually let out to the United Asian Bank on the terms as set out in the letter of an estate agent addressed to the Low Yat Group, the parent company of the respondent company (p. 130).

The trial Judge took the correct approach when he said at p. 4 of his judgment that "the tenant's case undoubtedly falls or stands as to whether the controversial paragraph applies to the facts or evidence in this case or not". (p. 69). The learned Judge then set out what he considered to be the three grounds which the respondent sought to justify. The first ground is the declining profits of the bowling alley due to a number of factors. This ground came out in the testimonies as well as in the documentary evidence. The trial Judge correctly held that this ground could not be one which was beyond the control of the landlord. In our view the trial Judge also correctly rejected what he considered to be the second ground namely the presence of bad elements causing disturbances in the bowling alley. The third ground however found favour with the learned Judge and this ground was the purported shortage or non availability of spare parts. That part of his judgment reads as follows:

> The allegation of shortage of the spare parts or the inability to obtain spare parts for the machines of the bowling alley has never been really challenged by the plaintiff also. I find on such overwhelming evidence that there were constant breakdowns in the machines of the bowling alley due to difficulty or inability in obtaining the spare parts for them and that the situation of the breakdowns was getting progressively worse.

The finding can be divided into two distinct parts. The first part is the finding on constant breakdowns of the machines. The second part is the finding on difficulty or inability in obtaining spare parts. With respect we are of the view that the second part of the finding is against the weight of evidence both in the testimonies of witnesses and the documents produced before the Court.

Let us look at the testimonies first. DW1, the Group Manager of Low Yat Group of companies (the parent of the respondent company) stated that the reason for closing the bowling alley was the "very substantial losses" incurred since the latter part of 1981 (p. 21). The main causes of these losses were disturbances caused by the bad elements and old equipments for which he said "spare parts very difficult and sometimes impossible to get" (p. 21). He also said in the latter part of his testimony that the bowling alley ran ten lanes and the other six lanes were not functioning "because we could not get spare parts". The learned Judge seems to be satisfied with this part of the evidence without however further examining closely the testimonies of the other witnesses and the documentary evidence. The evidence of DW3, the Manager of the Federal Bowl (also a member of the same parent company) and Sem Siong Bowl said categorically that to replace the equipments (in Sem Siong Bowl) would cost about RM1 million and because of the locality the management had to think of the returns on the investment of RM1 million. The management, he said, finally decided not to purchase new machines (p. 35-36). We consider this statement highly relevant.

The evidence which clearly negates any allegation of non-availability of spare parts can be found in a number of documents produced before the Court. Firstly the report by RIADA (p. 83) blames bad maintenance for the poor functioning of the bowling alley, although admitting also spare parts shortage. Then there is the monthly report of the respondent

company itself (p. 102) which indicates that there was a discussion on spare parts with the management but it is clear from the report that the spare parts were expensive but **not** unavailable. In fact the supervisor of the bowling alley in his letter to the Business and Administrative Manager of the Low Yat Group on 12 April 1982 (p. 103) stated that he had already ordered some spare parts from RIADA.

In *Peter Dixon & Sons, Ld. v. Henderson, Craig & Co.* [1919] 2 KB the subject matter was a contract for the sale of wood pulp to be delivered in certain quantities for the year provided that delivery under the contract might be suspended pending any contingency beyond the control of the parties which prevents or hinders delivery. In the judgment of Bankes, LJ at pg. 786 *Tennants Ld. v. Wilson & Co.* [1917] AC 495 was considered and Bankes LJ drew as one of rules from *Tennants Ld.* that a rise in price will not in itself constitute a hindrance to delivery.

It can be seen from the report by RIADA in this case that the management of the respondent company was responsible for the bad maintenance of the equipments in the bowling alley. The most telling piece of evidence was given by the respondent's own witness, DW3, the manager for both Federal Bowl and Sem Siong Bowl. He said that Federal Bowl was doing very well but Sem Siong Bowl was doing very badly. DW3 said Sem Siong Bowl's machines were old but even with the best machines business would still be bad for Sem Siong Bowl because the bowling alley was situated in a bad locality - p. 38. In other words this testimony confirms the real reason for closing Sem Siong Bowl i.e. the heavy financial losses incurred due to bad maintenance and bad location. But neither of these reasons is the fault of the appellant. The consultant puts the blame on poor maintenance for the frequent breakdowns of the bowling equipments apart from shortage of spare parts. The management was surely responsible for the location of the bowling alley. Slade LJ in *Cheall v. APEX* [1982] 3 All ER 855 referred to the reasoning of the speeches in *New Zealand Shipping Company Ltd. v. Societe Des Ateliers Et Chantiers De France* [1919] AC 1. The underlying principle there is that unless a contract clearly and specifically so provides, the Court will not construe an avoiding provision contained in it in such a manner so as to permit a party to take advantage of a situation brought about by his own act or omission.

(Lord Atkins said in the *New Zealand Shipping* case at p. 9):

> But if the stipulation be that the contract shall be void on the happening of an event which one or either of them can by his own act or omission bring about, then the party, who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong, in the one case directly, and in the other case indirectly in a roundabout way, but in either way putting an end to the contract.

Lord Finlay LC in the same case at 6, puts it more briefly thus: "It is a principle of law that no one in such case take advantage of a state of things which he himself produced".

There are other facts of this case we note which also seem to indicate an improper exercise of the power in para. 6 of the tenancy agreement. As early as 17 July 1982 in the letter from the respondent replying to the query by the appellant the first reason was disclosed in the first sentence of the letter produced earlier in the judgment that the bowling alley was to be closed because of financial losses. Thus almost simultaneously with the writing of that letter the respondent advertised in the *Malay Mail* to let out the said premises. We also note that by letter dated 21 August 1982 (p. 127) the respondent informed the appellant that the bowling centre would be closed on 4 October 1982 which means that on the date that the notice to quit expired (on 1 August 1982) the bowling alley was still not closed.

We accordingly allow the appeal. We grant a declaration to the appellant that the tenancy agreement has not been validly terminated.

As no evidence was adduced on the application for an injunction we make no order on any injunction.

The claim for damages for breach of contract shall be referred back to the Judge for assessment.

Counter-claim by the respondent is dismissed.

Costs to the appellant here and in the Court below. Deposit to be refunded to appellant.

Also found at [1983] 2 CLJ 208